

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

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18-CR-204 (NGG)

3 UNITED STATES OF AMERICA,

United States Courthouse
Brooklyn, New York

5 -against-

February 05, 2019
11:00 a.m.

6 KEITH RANIERE, et al.
7 Defendants.

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8 TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
9 BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES

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PROCEEDINGS

1 (In open court.)

2 THE COURTROOM DEPUTY: All Rise.

3 THE COURT: You may be seated.

4 COURTROOM DEPUTY: State your appearances.

5 MS. PENZA: Good afternoon, your Honor, Moira Kim
6 Penza Tanya Hajjar, Mark Lesko for the United States. Also at
7 counsel table is Nicole McFarland, staff attorney for the MDC;
8 John Matteo, MDC Facility Manager.

9 THE COURT: Good afternoon.

10 MS. PENZA: And Associate Warden Eleazar Garcia from
11 the MDC.

12 THE COURT: Good afternoon.

13 MS. PENZA: And finally at counsel table is Jonathan
14 Algor who is here for the subsequent proceeding.

15 THE COURT: Please be seated.

16 MR. AGNIFILO: Good afternoon, your Honor, Marc
17 Agnifilo, Teny Geragos, and Paul DerOhannesian and for Keith
18 Raniere who is present.

19 THE COURT: Thank you, please be seated. We're here
20 on a bail application which is complicated by the conditions
21 that were identified by defense counsel in his letter of
22 February 1st and February 4th at the MDC, correct?

23 MR. AGNIFILO: Yes, Judge.

24 THE COURT: The Court has reviewed the defendant's
25 bail application of January 25 and the Government's response.

PROCEEDINGS

1 So let's first talk about the actual bail application and then
2 we'll go into the issue of the current conditions at the MDC,
3 which have been apparently evolving since the fire. There was
4 a fire that took place that knocked out at electrical system
5 and other equipment during the coldest days of this century.

6 So go ahead.

7 MR. AGNIFILO: Yes, Judge, thank you.

8 We did file a bail motion, our third bail motion.
9 It's different than the others in that there is a due process
10 component to it. I think it's significant that we filed that
11 bail motion with the due process component two days before the
12 fire. So from our argument, even without the events that I
13 think we're going to review in part today, we believe that
14 Mr. Ranieri has had his due process rights violated.

15 I'm not going to belabor the points. Your Honor
16 knows I stand here at almost every court appearance, and
17 admittedly some of my co-counsel don't always ask for what I
18 ask for, but certainly for Mr. Ranieri's perspective we've
19 been asking for a trial since he's come to Brooklyn.

20 Now, there have been different reasons that we don't
21 dispute that have amounted to exceptions to the Speedy Trial
22 Act. And one of the things that is interesting, I don't know
23 that I've ever seen an answer in the case law to this, it's
24 interesting to note that 18 U.S. Section 3164, which is in the
25 Speedy Trial statute says that after 90 days an incarcerated

PROCEEDINGS

1 defendant gets released. Now, what relevance could that
2 statute have when you also consider that 3161 says after 70
3 days a case gets dismissed. It can't exist logically; it
4 literally makes no sense.

5 So the argument that we touch upon in our bail
6 motion is that the calculus behind 3164 has to be different
7 than 3161 in some regard. I think the regard really is this,
8 further on in 3161 they make distinctions between adjourned
9 periods that they call the fault, but say the fault or
10 responsibility of one party or another party. Motions aside,
11 and motions probably do exclude the time, but the vast
12 majority of the adjournments in this case have been due to a
13 combination of two things: One is my co-counsel, they have
14 the right to say we don't have the discovery as quickly as we
15 should have. But what I've endeavor to do is I've endeavored
16 in my motion papers to go through chapter and verse of all the
17 details of how this case did not have to become as
18 unmanageable, complex, whatever term you want to use, as it
19 became.

20 I'm not saying anything to say to besmirch my
21 colleagues at the U.S. Attorney's Office, who I like and
22 respect a great deal for a long time. They wouldn't meet with
23 us. We wanted to meet with them, to talk about discovery, a
24 way of making things easier. They didn't want to. They said
25 they didn't have to. And you're right, they don't have to.

PROCEEDINGS

1 But they certainly didn't contribute to making the case
2 easier.

3 It wasn't until your Honor sent us to Judge Scanlon
4 that Judge Scanlon, in my estimation, maybe the other parties
5 have a different view, held the Government's feet to the fire
6 and demanded answers and got some answers and started to move
7 this case forward. Because at this point we're in the weeds.
8 Your Honor made the very good point at one point of saying
9 this court, meaning the District Court, is not going to deal
10 with your in-the-weeds discovery issues, nor should it. And
11 your Honor wisely sent us to Judge Scanlon who got in the
12 weeds with us and then we started to get some progress.

13 It's a case that has a lot of different facets to
14 it. I think the Government is working hard; I do. I think
15 they are trying to get stuff to us expeditiously. But through
16 a series of complications, including and this is the other
17 part of the motion, there have been I don't know how many days
18 in January that legal visiting before even the fire, was
19 suspended in at the MDC.

20 THE COURT: We're going to get to that, as to the
21 currents circumstances.

22 MR. AGNIFILO: I'm curious why, it's a major
23 problem.

24 THE COURT: There is a, Judge Dearcy Hall, who has
25 issued a temporary restraining order in a civil litigation

PROCEEDINGS

1 brought by the Federal Defenders requiring that visitation be
2 restored during regular hours as set forth in the rules of the
3 facility, which I think are 8:00 a.m. to 8:00 p.m. seven days
4 a week. Whether or not that has been accomplished, we're
5 going to hear from the representatives of the MDC, who are
6 required to be represented by whomever they send, and they've
7 sent three people.

8 So I expect that we're going to get at least some
9 answers as to what the current status is of that and other
10 issues that may effect your client and the other two
11 defendants who we're going to be here in a few minutes.

12 It's important to the Court that we get the answers
13 and also that the improvements that are necessary to deal with
14 some of these really extraordinarily terrible conditions be
15 dealt with, at least with regard to these three defendants.

16 I don't have jurisdiction to run the MDC. I don't
17 want jurisdiction to run the MDC in formal circumstances. But
18 I do have jurisdiction to deal with the rights of the
19 individual defendants who have been detained at the MDC who
20 are assigned to me as defendants. So that's why we are here.

21 MR. AGNIFILO: I understand.

22 THE COURT: Frankly for two reasons. One, you
23 raised the third request for bail. And two, you've added to
24 it the issue of the circumstances, your client's detention at
25 MDC specifically, I understand all of that.

PROCEEDINGS

1 MR. AGNIFILO: The other part of it is 3164 says
2 something in the clearest terms, it says that incarcerated
3 defendants shall be given priority. It says "shall" in the
4 clearest terms.

5 With utmost respect to my colleagues at the United
6 States Attorney's Office, they've done everything other than
7 give Mr. Ranieri's case priority. They are continuing to
8 investigate, as is their right in a general sense, but I don't
9 know if it's their right with an incarcerated defendant.

10 They've taken the position in front of Judge
11 Scanlon, we have discovery that might be relevant to you but
12 we're not going to give it to you because we're still
13 investigating, because there might be a Superseding
14 Indictment. That's fair and kosher under the rules, except
15 when you consider that there is an actual statute that says
16 you shall give an incarcerated defendant priority.

17 That can't just be meaningless, that has to mean
18 something. I think what it has to mean is when you have an
19 incarcerated defendant who comes to court and says, you know,
20 Judge, I'm innocent. I want a trial of the earliest possible
21 date, and I certainly don't want to be incarcerated against my
22 will while I'm waiting for that trial. I don't think what the
23 Government gets to do then is to look at other defendants,
24 look at other charges, look at other Superseding Indictments.
25 Normally they can do that, but they can't do that when the

PROCEEDINGS

1 defendant is incarcerated because the words "shall be given
2 priority," have to mean something. They can't be words that
3 we can all decide to ignore.

4 One thing I do want to say, your Honor has been very
5 on top of the fact from the very first minute I stood in this
6 spot and talked to your Honor about this case about your
7 Honor's concern, the first thing you ever said about this case
8 is we're going to try to move Mr. Raniere with alacrity. I
9 was happy.

10 Here is the problem. The Government, and I'm not
11 for the moment putting ill motives on them, there is lots of
12 ways of making sure that a case does not move with alacrity.
13 We might supersede once, we might supersede twice. We have
14 discovery that might be relevant to other charges.

15 From my view of the world, they've put the Court in
16 a box. I remember standing here in the fall at some point and
17 we tried to reach a consensus on a trial date. I wanted
18 January 7. I wanted a January 7 trial, I made that very
19 clear. My co-counsel didn't. So we had an all-parties
20 agreement that we were going to try this case on the date that
21 we set in March.

22 It didn't happen in March. It didn't happen in
23 March certainly for no-fault of the Court, I think the Court
24 was willing and able to have the trial in March. We didn't
25 have the trial in March because there were discovery issues,

PROCEEDINGS

1 some of my co-counsel wanted more time to respond to the
2 enterprise letter. I'm aware of all of that. I'm not trying
3 to take things out of context.

4 But, we have one incarcerated defendant in this
5 case. And it happens to be the only defendant who has been
6 demanding a prompt trial. He has not gotten a prompt trial.

7 Even before this situation with the MDC ever started
8 to unfold, I submit that when we get into the facts of the MDC
9 all this fire did on January 27 is shine a spotlight on some
10 other issues within the MDC, which we're going to talk about,
11 lack of heat, things along those lines, we already had a
12 problem.

13 We had a problem as of the date we filed the motion
14 on January 25. From our estimation we believe Mr. Ranieri
15 should be released as a matter of fundamental fairness and due
16 process. And as a back up, as a Plan B, that he be released
17 on the conditions that we set forth in our motion. Thank you.

18 THE COURT: Let me hear from the Government.

19 MS. PENZA: Thank you, your Honor. I'm going to
20 address the propriety of the third bail motion aside from
21 MDC at the first instance because I want your Honor to
22 understand the Government takes the concerns about MDC
23 incredibly seriously. I don't want my position regarding the
24 impropriety of the third bail motion to suggesting that we do
25 not take those concerns very seriously.

PROCEEDINGS

1 So, your Honor, the third motion for bail that the
2 defendant put forth makes no meaningful difference. There has
3 been no change regarding the defendant's risk of flight,
4 regarding the dangerousness which your Honor has not yet even
5 reached, having found twice that the defendant was a risk of
6 flight based on two other packages.

7 And I think Mr. Agnifilo is stressing here the fact
8 that his co-counsel have now sought an adjournment, six-week
9 adjournment, based on the complexity of the case. He's --

10 THE COURT: As I recall it, it was on complexity,
11 which is driven in large measure by the amount of discovery
12 that needs to be reviewed by counsel. Do I not remember that
13 correctly?

14 MS. PENZA: Your Honor, that is true. But that has
15 not meaningfully shifted from when those defendants agreed to
16 the trial date in March. And so I think that's the difference
17 here.

18 So in terms of this case moving with alacrity, this
19 is a racketeering case, the charges span a long period of
20 time, there are six defendants, there is 12 terabytes of
21 discovery. So the case has been moving with alacrity.

22 Defense counsel has litigated at every single step,
23 as is their right to do, but every single step of that. There
24 is a reason why that is taken into account when you are doing
25 the speedy trial calculation. You can't have it both ways.

PROCEEDINGS

1 You can't litigate every single aspect and get your speedy
2 trial.

3 So even just the defendant's tactics alone pretrial,
4 which he is more than entitled to engage in, are one of the
5 real reasons why this case has taken the time it has, which is
6 not an unusual amount of time. Parties on both sides of the
7 table have had to request additional amount of time for
8 filings at various periods because we did agree to an
9 incredibly compressed motion schedule.

10 But the Government from the beginning has agreed to
11 try this case whenever your Honor set forth. We first
12 proposed a joint schedule with a January date, because that's
13 what the Court ordered. It was even tighter than the one we
14 ended up with, but that is what the Government said they would
15 do. When it was March, the Government said the same exact
16 thing, we will get our motions done, we will do whatever we
17 need to do to try the case.

18 But nothing meaningfully changed regarding the
19 amount of discovery. So defendants knew there was 12
20 terabytes of discovery back when we agreed on the March date.
21 Judge Scanlon set December 6 as the date by which we had to
22 produce substantial portions of discovery, we did that. And
23 despite the fact that we did that, because there was so much,
24 as is reasonable, three of the defendants have said that they
25 need more time to review that material.

PROCEEDINGS

1 So that's the situation we find ourselves in. There
2 is nothing that the Government has done differently from when
3 we began trying this case. So we have taken steps at every
4 single turn to protect the defendant's rights and to move
5 forward with alacrity, but certain things that the defendant
6 had done have not advanced that goal.

7 For example, your Honor, there were motions to
8 dismiss. Those could have been filed long before November
9 when they were eventually filed, if the defendant had wanted
10 to do so. There was nothing preventing him from trying to get
11 those issues before your Honor sooner; and therefore, we would
12 have had other issues kind of rolling along.

13 Additionally, when we're talking about discovery,
14 right now our colleagues are planning to go before Judge
15 Scanlon this afternoon to talk about privilege issues in this
16 case. We do still have discovery that has not been produced
17 to any of the defendants, except the defendants who are the
18 privileged holders, because there are complicated privilege
19 issues in this case. There are 45,000 e-mails that are
20 hitting on privilege terms. We have counsel for Nxivm that is
21 involved being guided by the defendants who are asserting very
22 complicated, if not fantastical, privileges at this point. So
23 the idea that the complexity is real, your Honor, and the
24 Government objects --

25 THE COURT: Who is the counsel for Nxivm?

PROCEEDINGS

1 MS. PENZA: Michael Sullivan, your Honor.

2 THE COURT: Go on.

3 MS. PENZA: So, your Honor, the Government objects
4 to this characterization that somehow the latest adjournment
5 of the trial is in any way due to the Government not
6 fulfilling its obligations. It's just not the truth. Three
7 of the defendants put in a letter, put in their motion --

8 THE COURT: I'm trying to recall, is Nxivm a
9 corporation?

10 MS. PENZA: It is, but it's complicated.

11 THE COURT: I'm sure.

12 MS. PENZA: We have used that as an umbrella term
13 for a large number of organizations, including corporations
14 affiliated with individual defendants. So I'm using it as an
15 umbrella term.

16 THE COURT: And Judge Scanlon is dealing with this.

17 MS. PENZA: Yes.

18 THE COURT: Go on -- let me, just before you
19 continue. I just want to clarify that Mr. Ranieri did consent
20 to a March 18, 2019, trial, did he not, moving it from January
21 to March?

22 MR. AGNIFILO: We consented, yes. That's right.

23 THE COURT: Okay. There was that period that was
24 consented to by everybody, I take it, as I recall, including
25 Mr. Ranieri.

PROCEEDINGS

1 MR. AGNIFILO: That's right.

2 THE COURT: So the only, the jump was from March 19
3 to April 29, which was not consented to by Mr. Ranieri.

4 MR. AGNIFILO: That is true also.

5 THE COURT: Go ahead.

6 MS. PENZA: So, your Honor, I believe if there is
7 any particular questions, the Government is happy to raise
8 them.

9 THE COURT: What about the due process issue
10 generically?

11 MS. PENZA: Your Honor, we don't believe that the
12 defendant has cited a single case that holds the position that
13 they are now taking. The defendant has been incarcerated for
14 less than a year. When you compare that with other
15 racketeering cases that is a significantly less, a shorter
16 period of time.

17 I'm not saying whether that is -- I think your
18 Honor's decision to move with alacrity and all of the parties'
19 efforts in that regard are correct but, I don't think we're
20 even close to a consideration on a due process violation.

21 THE COURT: Mr. Agnifilo, how do you believe you've
22 overcome the conclusion the Court reached that the defendant,
23 taking into account this new application, that the defendant
24 is a flight risk even with this additional \$300,000 commitment
25 by a suretor.

PROCEEDINGS

1 MR. AGNIFILO: Judge, I think we've been trying to
2 sort of erode away at the initial notion that the Government
3 put forward that he fled to Mexico. I think your Honor in his
4 second decision did walk that back quite a bit. And said you
5 were somewhat concerned about the cellphone usage and things
6 like that, but it was less clear because of the timing of
7 things. Because it's not as though -- he actually came back
8 to the United States on the day of the New York Times article
9 that talked about the branding or soon thereafter, rather than
10 went to Mexico for the first time.

11 My argument is there is really nothing strong in the
12 record. I say this -- I don't want to ask to reargue the
13 issue of flight -- and I don't. I think your Honor was very
14 circumspect in your prior decision that there was not strong
15 evidence of flight.

16 I think that with a first arrest, U.S. citizen, I
17 think that we have a colorable argument that at some point we
18 have to meet a threshold that makes sense. I think all things
19 get to be considered together. I think it's one thing to keep
20 someone incarcerated when he's a first arrest, U.S. citizen,
21 for three months pending a trial, maybe even four months
22 pending a trial; but now we're talking a year pending a trial.

23 And the Government didn't have to do this. The
24 Government is taking advantage of certain procedural
25 implements in the law that they can supersede Indictments, but

PROCEEDINGS

1 if they wanted to try Ranieri right away they could have tried
2 Ranieri in the fall if they wanted to, but they didn't want
3 to. That's the point. They wanted to add, they want to do
4 everything other than give him the priority that section 3164
5 says he's assured of. They could have tried Ranieri and
6 Allison Mack or Ranieri alone in the fall. But they didn't
7 want to, because they got what they wanted, they got him in
8 jail.

9 One wonders, if he wasn't in jail would they be
10 pressing for a fall trial? They might have, that might have
11 changed things.

12 I'm not saying they don't have a right to supersede
13 Indictments, they have the right to do all those things. I
14 think they have been -- one of the things I think is important
15 is we didn't get engaged with the firewall team until October.
16 Mr. Ranieri got locked up in March. They had to see that
17 there were going to be attorney-client issues.

18 In answer to your Honor's question, counsel for
19 Nxivm is the former United States Attorney for Massachusetts.
20 He's a pretty -- he seems to be above approach. I've never
21 been a former U.S. attorney of anywhere.

22 THE COURT: U.S. Attorney?

23 MR. AGNIFILO: Yes, for Massachusetts, correct, for
24 a big stretch of time. I think if the Government really
25 wanted to move this case along, with a sense of urgency, there

PROCEEDINGS

1 are certain things they could have done different.

2 THE COURT: I take it he's been compensated from
3 this Trust as well, or certainly could be, could he not?

4 MS. PENZA: He is, your Honor. He has represented
5 to us that he is being compensated.

6 THE COURT: So he's paid by the Trust as well.

7 MR. AGNIFILO: That's fine.

8 THE COURT: I'm just pointing that out, that
9 everybody is being paid by the Trust.

10 MR. AGNIFILO: We're just happy the lawyers are
11 being paid, that's a step in the right direction.

12 THE COURT: Well, we'll talk about that during the
13 Curcio hearing. I'm not going to talk about that now. I just
14 wanted that clarified, that everyone, as they have a right to,
15 is being paid for their representation of the defendants and a
16 also Nxivm. Okay.

17 MR. AGNIFILO: The point is, the Government
18 shouldn't have the ability to keep someone in jail and then do
19 everything other than try his case. 3164 has to mean
20 something; it can't mean what has happened here.

21 THE COURT: Isn't it true, though, that on the issue
22 of due process, there is no case law in the Second Circuit
23 that indicates that a year or 13 months, which what it would
24 be when we start trying this case, period of detention
25 constitutes a due process violation under Second Circuit case

PROCEEDINGS

1 law; isn't that fair?

2 MR. AGNIFILO: The Second Circuit, I would submit,
3 even goes further than that. The amount of the incarceration
4 is far from dispositive, that it's other factors.

5 I think the Government is right, there are cases
6 where someone has been incarcerated for 15 months, 16 months
7 pending trial. I don't know in those cases that that
8 defendant has been pretty much demanding, to the extent I can
9 demand anything, an immediate trial since the second we got to
10 the district.

11 THE COURT: But that having been said, with all due
12 respect, you didn't say at the time that you actually
13 consented to moving the trial from January to March, you
14 weren't saying that we want a trial tomorrow; because you
15 could have said that too. You were telegraphing that to me
16 that it would be useful for you to have the additional time,
17 and that you were consenting to having the trial pushed back
18 to March 18. I'm the one who was trying to get it tried on
19 March 18, actually perhaps along with you, but there were some
20 real issues that effected at least three of Mr. Ranieri's
21 co-defendants.

22 And there is case law that makes it clear that the
23 Court has the authority to take those concerns into account
24 when setting a trial date. Yes?

25 MR. AGNIFILO: There is no doubt the Court has that

PROCEEDINGS

1 authority. What I think I put on the record --

2 THE COURT: I'm asking you about the due process
3 issue. You're raising a due process issue that has never been
4 recognized or at least under circumstances that have not been
5 recognized as requiring a defendant to be released from
6 detention or have an immediate trial. That's what I'm trying
7 to arrive at here.

8 MR. AGNIFILO: Right. So ultimately everything your
9 Honor said is correct. Part of the problem -- I'm not putting
10 this exclusively on the Government. My co-defendants -- I
11 wanted a January 7 trial, my co-defendants said no way we
12 don't want a January 7 trial, our clients are released.

13 THE COURT: Then again, I come back to the Trust,
14 some people who are being paid their fees by the Trust want a
15 trial later, some want a trial now.

16 My concern is that is anybody manipulating this
17 process on the defense side, I'm sorry they are not all here,
18 but I'm happy to mention this tomorrow when we meet again,
19 that's a concern that I have. This situation has been
20 complicated by circumstances that do not normally arise in a
21 multi-defendant setting. Everyone has their own lawyer. They
22 are being paid by their client or they are being paid through
23 Federal Defenders or CJA, and so there isn't this aggregation
24 of interests that exists due to how the attorneys are being
25 compensated. That's just one of my concerns.

PROCEEDINGS

1 So you may be arguing this and you may have every
2 right to feel this way, but the law isn't with you on this.
3 Because you've basically acceded to the delay. It's only a
4 six-week delay beyond the date I was going to try the case any
5 way that you agreed to, that's really where we are. It was
6 March 18, and when we moved it, we moved it April 29, that's
7 six weeks. And you had agreed to March 18; isn't that right?

8 MR. AGNIFILO: I agreed to March 18 because I have
9 co-counsel who wouldn't do another -- what I said to the Court
10 at the time, I said this was -- because your Honor was upset,
11 in my recollection, that I thought your Honor thought that
12 March 18 was too far into the future. Because if I remember
13 right, I think your Honor was considering moving the January 7
14 date only a couple of weeks. Then we come back with March 18
15 and your Honor I think was concerned that that was too far.

16 THE COURT: You agreed to it, so why are we arguing
17 about this? We're not arguing, we're just considering these
18 different aspects of what has happened. This is the history
19 of the case.

20 I'd like to move on to the future of the case.

21 MR. AGNIFILO: Very good. Me too, Judge.

22 THE COURT: Do you have something else you'd like to
23 say, ma'am?

24 MS. PENZA: Your Honor, we just again believe that
25 risk of flight needs to be revisited right now. If there are any

PROCEEDINGS

1 questions about the defendant's package he proposed, we can
2 address that.

3 THE COURT: I think you did address it in your
4 papers, did you not?

5 MS. PENZA: Just regarding the -- we've put in a
6 very brief letter, your Honor.

7 THE COURT: I know. Did you want to say more? So
8 say it, so we have a record here.

9 MS. PENZA: The only thing we would say is that
10 defendant's characterization regarding the flight from Mexico,
11 the Government still stands by its assertion that the
12 defendant was attempting to evade law enforcement at the time
13 that he was in Mexico. And that is evidenced, in part, by the
14 fact that, as we put in our most recent filing last night
15 which is not on the docket yet, but in our most recent filing
16 that at the time of his actual arrest he was hidden in a back
17 room at the time being hidden by "DOS" slaves, as we've been
18 calling them, in quotes.

19 There are a couple of concerns regarding redactions
20 that we are conferring with defense counsel, which is why we
21 haven't filed it on the docket yet.

22 THE COURT: Has Mr. Raniere's counsel seen it?

23 MR. AGNIFILO: We have. It was e-mailed to us last
24 night.

25 THE COURT: Okay, good. That's what I'm most

PROCEEDINGS

1 concerned about. Anything else?

2 MS. PENZA: Then we have a concern regarding the
3 person that they have proposed as a suretor. There are
4 significant concerns about his involvement in criminal
5 activity within this case.

6 THE COURT: If we get there.

7 MS. PENZA: Thank you, your Honor.

8 THE COURT: So now, another aspect of this is, if
9 there were to be some package that the Court would seriously
10 consider, there is a question of what is going on at the MDC
11 and what's been going on there since the fire about a week
12 ago, a little more than a week ago. Perhaps a representative
13 of the MDC could provide the Court with a status report on the
14 conditions under which Mr. Raniere is currently detained at
15 the MDC. I don't want to hear from a lawyer.

16 MS. PENZA: I think Mr. Matteo, the facility
17 manager, could testify.

18 THE COURT: Thank you for coming, sir. Fill us in.
19 Where is he being housed? Let's start there. I'm going to
20 examine you. How is he being housed? Where is he being
21 housed specifically at the MDC?

22 MR. MATTEO: I believe I62 housing unit, located in
23 MDC Brooklyn's west building.

24 THE COURT: In the west building.

25 MR. MATTEO: Correct.

PROCEEDINGS

1 THE COURT: That's the building that had the fire?

2 MR. MATTEO: Correct.

3 THE COURT: What floor is that on?

4 MR. MATTEO: The fire took place on the second
5 floor.

6 THE COURT: Where is he being housed?

7 MR. MATTEO: Sixth floor.

8 THE COURT: Is he in a unit or is he in special
9 housing?

10 MR. MATTEO: I believe he's in a regular housing
11 unit.

12 THE COURT: What are the conditions in the regular
13 housing unit at this time in terms of heat, hot water, food
14 service, availability of medical attention, availability of
15 medicines. I don't know whether he's taking any medicine,
16 we're not going to discuss the specifics of his medical
17 condition because we're in open court, but if you could just
18 explain where are we on Tuesday, February 5, 2019, with regard
19 to his housing unit.

20 MR. MATTEO: Your Honor, MDC Brooklyn is fully
21 restored as far as electrical. It was restored on Sunday
22 approximately 1:10 in the afternoon. So MDC Brooklyn is
23 fully, got full electrical coming from the utility company,
24 Con Edison. All housing units have full lighting, life safety
25 devices, fire alarm, protection, sprinkler protection. It

PROCEEDINGS

1 does have hot water. It has heating and ventilation
2 throughout the building.

3 THE COURT: With regard to the distribution of
4 medicine and the availability of medical attention for
5 detainees who are in need of such help.

6 MR. MATTEO: Your Honor, I'm the facility manager at
7 the institution, I deal with the construction maintenance.
8 But I can say I've been at the institution every day since the
9 fire, and I can say that medical rounds and medication has
10 been distributed to every single housing unit daily. I've
11 witnessed it with my eyes, medical staff going unit to unit,
12 as I was going to each housing unit throughout the day.

13 THE COURT: With respect to any additional
14 components of the operation that are not operable now, what
15 are you working on to bring those up to speed or back to speed
16 so that you're fully operational?

17 MR. MATTEO: As of Sunday when we restored
18 electrical service to the building, the entire building, all
19 functions, as far as inmate telephones, e-mail access, inmate
20 TVs, have been fully restored.

21 THE COURT: Ms. McFarland, you received the TRO from
22 the Court in this the case involving Federal Defenders. Are
23 you in compliance with the requirement that attorney-client
24 visitation take place from 8:00 a.m. to 8:00 p.m. seven days a
25 week?

PROCEEDINGS

1 MS. MCFARLAND: This morning we started legal
2 visiting from 8:00 a.m. We were progressing. I checked
3 before I left, it was still in progress.

4 THE COURT: Mr. Agnifilo, do you have anything to
5 report on this subject? We have representatives, senior
6 representatives, of the MDC here and so it would be useful for
7 the Court to hear what problems you continue to have, if
8 you're continuing to have problems.

9 MR. AGNIFILO: So legal visiting was canceled on the
10 following day, each day: January 4, January 5, January 6,
11 January 9, January 10, January 11, the 14th, the 21st, then
12 the week of the fire. Starting from the 27th, which was the
13 day of the fire through -- I think legal visiting was, there
14 was some legal visiting for half an hour, 45 minutes maybe
15 yesterday. That's more than half of January.

16 THE COURT: Before the fire, I hear you. I'm going
17 to ask about that. But before the fire, were you able or was
18 Mr. Ranieri able to reach you by telephone during the entire
19 month of January until the fire?

20 MR. AGNIFILO: So he can reach us through Core
21 Links, which is an e-mail service. The e-mails are obviously
22 delayed sometimes only a few hours, sometimes a few days. We
23 will try to communicate with him and tell him things that we
24 want to talk about at the meeting a day or two days ahead of
25 time and he doesn't get the e-mail until after two days when

PROCEEDINGS

1 we go to see him. I don't know why the Core Links system
2 takes so long sometimes and not others. But it is a problem.
3 So there is that.

4 We don't speak on the phone because the calls are
5 recorded. And we don't want to have attorney-client
6 communications being recorded, so we don't do that.

7 THE COURT: All right. But one of my questions is,
8 why were there no attorney-client visitations during the part
9 of January before the fire? I don't understand that. Is
10 there an answer to that question?

11 MS. McFARLAND: On the 4th, 5th, 6th I believe we
12 had power issues. Mr. Matteo can speak to that, back on the
13 4th, 5th, 6th it was canceled.

14 THE COURT: Because of power issues.

15 MS. McFARLAND: Yes.

16 THE COURT: Is that power issues in the same
17 facility that had the fire?

18 MR. MATTEO: Correct.

19 THE COURT: So you knew there were power issues in
20 early January.

21 MR. MATTEO: We did experience an electrical issue
22 prior to the fire. We did have representatives from the
23 equipment come in and do a full check of the system.

24 THE COURT: They did a good job apparently. I'm
25 being facetious.

PROCEEDINGS

1 These are people who fix something that then had a
2 fire; isn't that right?

3 MR. MATTEO: Well --

4 THE COURT: I'm not trying to manage your business,
5 but if there is a continuing problem with the power supply and
6 they are not adequately fixing it, it's time to get someone
7 else who knows how to do it.

8 MR. MATTEO: Your Honor, the company that we had
9 come in is the manufacturer of the equipment.

10 And the issue that we had initially on the fourth, I
11 believe the date was, we got it back online. We checked the
12 equipment in that whole cabinet where the fire took place, in
13 a similar location but the back portion of the cabinet, not
14 the portion we were having the problem with. We have since
15 had an engineering firm come in and start a package, the
16 investigation to get us back.

17 THE COURT: So let me ask this, what about the
18 problem with communication between by computer by e-mail
19 between a detainee and his or her attorney, that's effected by
20 the power availability, right?

21 MR. MATTEO: Right.

22 THE COURT: Is that all back in operation now?

23 MR. MATTEO: Correct, we're fully functioning.

24 THE COURT: Why is there a substantial delay, if
25 there is substantial delay that Mr. Agnifilo speaks of, for

PROCEEDINGS

1 e-mails to get back and forth between a lawyer and his client
2 or her client?

3 MR. GARCIA: We would have to see if Mr. Ranieri, if
4 he's on a mail monitoring or e-mail monitoring. A lot of
5 times through intelligence we have to review the e-mails
6 before we release them back to the inmate.

7 THE COURT: Even if they are addressed to his
8 lawyer? I thought those were privileged.

9 MR. GARCIA: I believe they probably are, sir. If
10 they are identified as attorney-client we don't review them.

11 THE COURT: You need to make sure that if the
12 e-mails are addressed to Mr. Agnifilo, his attorney, then
13 those should go through. You should have a program that
14 permits those to go through promptly. I appreciate it if you
15 would examine whether there is any problem with that and
16 rectify it so that those communications going back and forth
17 are provided promptly to the recipient.

18 MR. GARCIA: Yes, sir.

19 MS. PENZA: Your Honor, if I may, I do want to
20 clarify regarding the phone calls. That is a choice that
21 Mr. Ranieri and his counsel have clearly decided to make, but
22 the Government does not receive phone calls between a
23 defendant and his attorney. We have arrangements with the MDC
24 if we send a subpoena to receive phone calls, we specifically
25 ask that those phone calls be excluded.

PROCEEDINGS

1 I've worked with Mr. Agnifilo on other cases, he
2 knows that we follow that protocol so he would be able to
3 reach him immediately that way.

4 THE COURT: I understand that, but he may prefer to
5 either meet in person or operate by e-mail. That's his
6 privilege. But I've always understood, and you're just
7 reaffirming, that you don't monitor attorney-client phone
8 calls out of the MDC.

9 MS. PENZA: Correct.

10 THE COURT: You understand that to be case
11 generally? Do you believe that the Government -- let's cut to
12 the chase here, do you believe that the Government is
13 monitoring your phone calls with Mr. Ranieri from the MDC? If
14 you do, I want to know about it and I'll order them not to do
15 it.

16 MR. AGNIFILO: I have no reason to think that they
17 are.

18 THE COURT: All right. That's fine, thank you.

19 MR. AGNIFILO: There are a few other questions that
20 I have.

21 THE COURT: Please.

22 MR. AGNIFILO: My understanding, Judge, is that at
23 least Mr. Ranieri's unit, I think other units too, have been
24 without heat not just because of the fire, but for substantial
25 periods beforehand. One of the problems is we'll go to meet

PROCEEDINGS

1 with Mr. Raniere on one of the days when there is visiting in
2 January and he's frankly, he looks bedraggled and exhausted.
3 He tells me his drinking water freezes at night.

4 I can also say with Judge Torres' hearing this
5 morning, where it's becoming very quickly established as what
6 seems to be a conclusive fact that there was no heating for
7 different periods of time throughout January, including from
8 January 14 to January 16, which is before the fire by two
9 weeks.

10 THE COURT: The reason you're here and not there is
11 because she's conducting a hearing for certain individuals who
12 are defendants in her cases. And I'm holding a hearing here
13 for individuals who are defendants in cases assigned to me.
14 So whatever she's doing over there, I wish her well.

15 But I'm trying to get to the bottom of whether this
16 is a problem, that there are problems with the way services
17 are being delivered at the MDC for Mr. Raniere, and in a few
18 minutes for two other defendants who their attorneys have
19 specific concerns.

20 And so like I said at the beginning, I'm not hear to
21 resolve the problem of the fact that the MDC should probably
22 be torn down and a new building put up. I'm not the
23 appropriator. I'm not the executive branch.

24 I'm just worried about Mr. Raniere, whether he's
25 going to have heat, hot water, the ability to talk to his

PROCEEDINGS

1 attorney, the ability to have medication as required, the
2 ability to have recreation, all of that, if he's still in
3 jail. That's what I'm here for.

4 MR. AGNIFILO: I appreciate that.

5 THE COURT: I don't want to conflate what Judge
6 Torres is doing for the defendants she's dealing with and what
7 I'm doing with regard to the defendants I have in my
8 jurisdiction.

9 MR. AGNIFILO: So my concern then --

10 THE COURT: I don't want to know about her hearing.
11 Her hearing is irrelevant to me.

12 MR. AGNIFILO: I understand. But what your Honor is
13 saying is relevant to unit 62, where Mr. Raniere is. And my
14 understanding --

15 THE COURT: I'll ask the question. You had didn't
16 raise that question.

17 MR. AGNIFILO: -- that unit 62 is without heat.

18 THE COURT: All right, stop.

19 Unit 62 is without heat, according to Mr. Agnifilo,
20 and that occurred before the fire in the power room or
21 whatever it's called. Do you monitor this regularly? Is
22 there a central system for establishing what the heat is in a
23 given unit? Is there say thermostat on unit 62? How can you
24 address that?

25 MR. MATTEO: Your Honor, we've been taking

PROCEEDINGS

1 temperature readings. We did have a mechanical piece of
2 equipment fail, as they claim. As soon as we realized --

3 THE COURT: What did that piece of equipment?

4 MR. MATTEO: It's the heating coil for that unit.
5 Every housing unit has two heating coils, one for the cell
6 areas where the inmates sleep, and one of the common areas,
7 two different units. The one for the cells did experience --

8 THE COURT: Did experience.

9 MR. MATTEO: It did experience a mechanical problem.
10 We fixed the repairs. We continued to have a little repairs,
11 adjustments, throughout the week.

12 THE COURT: What is the situation as of today?

13 MR. MATTEO: The current situation is yesterday --
14 this morning I was in two different courts, your Honor, so I
15 don't have the temperature readings for today. But I can tell
16 you for the last couple of days -- they just showed me one for
17 today, one second.

18 As of Friday, February 2, 2019 at noon.

19 THE COURT: February 2 was Saturday.

20 MR. MATTEO: As of Saturday, sorry, as of February 2
21 at noon I62 unit temperature, cell temperature, was 68 degrees
22 which is in compliance with the Bureau of Prison's policy,
23 that's our target set point.

24 THE COURT: You don't know what it's been since
25 then.

PROCEEDINGS

1 MR. MATTEO: From the readings that the staff took
2 today, it's 79 degrees in the south. We've been monitoring
3 the temperature throughout on a daily basis, not always at
4 noon, not always at 8:00 o'clock in the morning.

5 I came in personally early one morning at
6 6:00 o'clock, I went straight to all the housing units, took
7 temperature readings at 6:00 o'clock in the morning to get a
8 variation of temperature throughout different hours of the
9 day. Within the last couple of days, a week, they all have
10 been on target with Bureau of Prisons', policy which is our
11 target point of 68 degrees.

12 MR. AGNIFILO: Your Honor, I have no reason to
13 believe that the temperature has been a problem for the last
14 two or three days. That's not the basis of my concern.

15 The basis I believe the temperature was in the 30s
16 during the days following the fire and on Martin Luther king
17 day, specifically, I think it was 3 or 4 degrees here in New
18 York City.

19 THE COURT: I remember.

20 MR. AGNIFILO: My concern also is, I think it was so
21 cold that the personnel who worked at the jail had hats,
22 coats, scarves but the inmates were given none of those
23 things. There weren't any blankets given, although the city
24 sent blankets to the inmates, they weren't given. Some staff
25 members had area heaters. I understand they don't want to

PROCEEDINGS

1 give those to the inmates, but they didn't give them to the
2 inmates. They didn't give them clothing. They had didn't
3 give them blankets. Quite frankly, they let them freeze for
4 an extended period of time.

5 THE COURT: I understand all of that. Obviously
6 this has been a major crisis at the MDC, not just for your
7 client. I understand that.

8 I'm trying to understand in connection with your
9 bail application, what is the current situation and what might
10 it be going forward. That's really where I am. I'm not
11 talking about January anymore. I'm talking about February and
12 March, the balance of the cold months, how is it going to be.
13 You've raised the issue, I'm trying to elicit the current
14 status from representatives who are here to answer the
15 questions.

16 MR. AGNIFILO: My concern is that we look at today's
17 situation in a continuum, because it's not as though there
18 weren't any problems at all before the fire, there were
19 substantial problems before the fire and they continue. I
20 think these three representatives probably worked very, very
21 hard, and none of this is their fault, but there is a problem.
22 There is a probable. There is a well-documented problem that
23 is rooted in history, to think it's all going to be solved now
24 that they had a fire, I just don't think so.

25 So I think the past is relevant in predicting the

PROCEEDINGS

1 future. I think that they are probably trying, they are
2 probably working on it, a lot of hard working people are
3 trying the best they can, but there is a history. The water
4 is brown sometimes for two days on end. There are issues with
5 light. There is issues with the heating that we've just
6 started to get into. There is issues with the food. I don't
7 want to belabor the whole thing, but it's really a problem.
8 It all is part of the due process application.

9 THE COURT: I see. All right, thank you.

10 I just came from a meeting of the Board of Judges of
11 the Court, and we were advised about a number of facts, some
12 of which would give us some hope that there will be a more
13 comprehensive solution of the problems of the operation of the
14 MDC. The head of the Bureau of Prisons, I think, is aware of
15 these problems. The Acting Attorney General was here in New
16 York and was made aware of the problems. And the U.S.
17 Attorney of this District and the U.S. Attorney of the
18 Southern District have both engaged on these problems.

19 Part of the problem is going to be obtaining the
20 financial resources necessary to upgrade systems, the roof
21 needs to be fixed. There are all these problems that
22 transcend the immediate problem of heat, hot water, and hot
23 food. But I can only deal with the immediate problem.

24 And it would appear to the Court that even if there
25 was a problem, if it continued would have made it more

PROCEEDINGS

1 difficult to make a decision about what to do about bail. The
2 fact is that the conditions in the facility are better and
3 more up to standard at this point. The Court was concerned
4 about the heat problem. The Court was concerned about the
5 food problem. The Court was concerned about the problem of
6 counsel meeting with the detainees, because that is a true due
7 process problem. All of those problems have been dealt with
8 in the immediate term, as far as the Court is aware. If those
9 problems reoccur, you can bring them to my attention at any
10 time, and we will dispose of those problems, depending on what
11 the circumstances are.

12 I'm going to take everything you've said into
13 account, everything the Government has said into account, and
14 I'll rule on your application for release on bail by the time
15 we meet tomorrow.

16 I just want you to understand that part of what I'm
17 looking into has to do with, should your client remain
18 incarcerated until the trial, will you be in a position to
19 adequately prepare your defense. That's a major issue for the
20 Court. To the extent that -- I take it you're not interested
21 in further delay of the trial in order to do so, I know you're
22 extremely talented and that you will do whatever is necessary
23 to be ready for trial on April 29. So I'm not even going to
24 ask you would you like to have because of this situation that
25 existed in January further delay of the trial. You don't, do

PROCEEDINGS

1 you?

2 MR. AGNIFILO: I don't.

3 THE COURT: There you go. All right.

4 Is there anything else from the defense in
5 connection with the bail application?

6 MR. AGNIFILO: I want to thank you for seeing us on
7 short notice on these issues.

8 THE COURT: Let me say this, it's I think it's
9 really important that you brought this to my attention. I
10 can't imagine people in the dark, in subfreezing temperatures
11 without any understanding of when it will all end. It's not
12 humane. And whatever the reasons were, which were not under
13 the control of the people sitting here, apparently, it still
14 raised tremendous concerns on my part.

15 I would also say on the part of all the other judges
16 who have defendants sitting in detention, so you should
17 understand that this issue has been raised about as high as it
18 can go within the judiciary in this District and in the
19 Southern District and will continue to, those who don't have
20 the case involving the civil case will continue to manage our
21 cases and our defendants' circumstances, very, very closely.
22 So you should understand that.

23 (Continued following page.)

24

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PROCEEDINGS

1
2 We're going to adjourn, Mr. Raniere. And we're
3 doing to have the second matter with the two defendants in the
4 other case. And the representatives of the Bureau of Prisons
5 need to stay for that.

6 (Whereupon, the matter was concluded.)

7 * * * * *

8 I certify that the foregoing is a correct transcript from the
9 record of proceedings in the above-entitled matter.

10 Rivka Teich, CSR RPR RMR FCRR
11 Official Court Reporter
Eastern District of New York
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Rivka Teich CSR, RPR, RMR FCRR
Official Court Reporter